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Supreme Court, U.S.
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No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1993

JOHN P. DUNBAR JR.,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When a reviewing court sets aside as unlawful under 5 U.S.C. § 7703(c)(2) a federal agency's action in removing an employee, is the Merit Systems Protection Board required by the Civil Service Reform Act and its own regulations to treat the removal action as void ab initio and of no effect, and to order the employee to be reinstated by the agency with back pay?

2. When the reviewing court, after setting aside a removal action as unlawful under 5 U.S.C. § 7703(c)(2), remands the matter to the Merit Systems Protection Board with directions "to have the decision to remove redetermined," does the Merit Systems Protection Board vio-

late the mandate of the reviewing court by merely reaffirming the agency's original removal action instead of further remanding the matter to the agency to have the action redetermined?

3. When one panel of the reviewing, federal appeals court sets aside an agency's removal action for harmful error under 5 U.S.C. § 7703(c)(2) and remands the matter to the Merit Systems Protection Board with directions "to have the decision to remove redetermined," and the Merit Systems Protection Board thereafter disregards those directions by reaffirming the agency's original removal action instead of further remanding the matter to the agency for a proper redetermination of such action, is a different panel of the same reviewing court, on a second appeal by the removed employee, bound by

the "law of the case" to enforce the first panel's mandate?

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OPINIONS BELOW

In an unpublished opinion, the Administrative Judge issued her first Initial Decision in this matter on June 25, 1990 (A-1), which became the final decision of the Merit Systems Protection Board (hereinafter the "Board" or "MSPB") by Order dated November 9, 1990 (A-40). This final decision of the Board was subsequently reversed by the United States Court of Appeals for the Federal Circuit in an unpublished Decision filed July 30, 1991 (A-43).

On remand from the Federal Circuit, the Board entered an unpublished Opinion and Order dated February 14, 1992, in turn remanding the matter to the Administrative Judge for further proceedings (A-49). The Administrative Judge thereafter

issued a second, unpublished Initial Decision on June 23, 1992 (A-52), which decision became the final decision of the Board by Order dated November 3, 1992 (A-110). This final decision was affirmed per curiam and without opinion by the Federal Circuit on July 9, 1993 (A-113).

JURISDICTION

The judgment of the Federal Circuit was entered on July 9, 1993 (A-113). The Federal Circuit denied the Petitioner's timely petition for rehearing by Order dated September 7, 1993 (A-115). Jurisdiction of this Court to review the judgment of the Federal Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THE CASE

The statutory provisions involved in this case are 5 U.S.C.A. § 7701(c)(2)(A) (West 1980) and 5 U.S.C.A. § 7703(c)(2) (West 1980), which provide:

> § 7701. Appellate procedures
>
> . . . .
>
> [(c)](2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment--
>
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision[.]
>
> * * *
>
> § 7703. Judicial review of decisions of the Merit Systems Protection Board
>
> . . . .
>
> (c) In any case filed in the United States Court of Appeals for the Federal Circuit,

> the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--
>
> . . . .
>
> (2) obtained without procedures required by law, rule, or regulation having been followed[.]

The regulatory provisions involved in this case are 5 C.F.R. § 752.404(f) (1993) and 5 C.F.R. § 1201.56(b)(1) (1993), which provide:

> § 752.404 Procedures.
>
> * * *
>
> (f) Agency decision. In arriving at its decision, the agency shall not consider any reasons for action other than those specified in the notice of proposed action. It shall consider any answer of the employee and/or his or her representative made to a designated official and any medical documentation furnished under paragraph (c) of this section. The agency shall deliver the notice

> of decision to the employee at or before the time the action will be effective, and advise the employee of appeal rights.
>
> * * *
>
> § 1201.56 Burden and degree of proof; affirmative defenses.
>
> . . . .
>
> (b) Affirmative defenses of the appellant. Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard stated in paragraph (a) of this section, if the appellant:
>
> (1) Shows harmful error in the application of the agency's procedures in arriving at its decision[.]

STATEMENT OF THE CASE

This petition involves an outrageous and ultra vires attempt by the Merit Systems Protection Board to revive and re-

affirm the Navy's action in firing the Petitioner from his job, even though that action had been set aside for harmful procedural error, and thereby entirely voided from its inception, by the reviewing court. Equally outrageous and irregular are the Board's refusal to follow the reviewing court's instructions on remand to further remand this matter to the Navy for a redetermination of the removal action and the reviewing court's refusal to enforce those instructions on a second appeal of this matter by the Petitioner.

On February 8, 1989, Petitioner John P. Dunbar Jr., an antiterrorism instructor for the United States Navy, GS-11,[1]

---

[1]As acknowledged by the Administrative Judge in both of her initial decisions (A-36, A-37, A-105), Mr. Dunbar and

was sent a "Notification of Proposed Removal" specifying three reasons for the proposed termination of his employment: (1) "Absence without leave (AWOL)/failure to follow absence and leave procedures"; (2) "Leaving the worksite without permission (Second Offense)"; and (3) "Insubordination/threatening a supervisor" (A-118). Mr. Dunbar was subsequently removed by a "Notification of Removal" dated March 8, 1989 from Lanny McCullah, the deciding official (A-123). In the removal notice, McCullah wrote:

> Your violent outburst and aggressive behavior in this instance, coupled with a May 17,

---

at the time of his removal had a satisfactory performance record and many years of exemplary service in the Reserves. He had also been commendated by the San Diego Chief of Police for his action in apprehending a suspected criminal (A-36, A-105, A-128).

> 1988 allegation of solicitation for murder, for which you were placed on administrative leave, and your continued harassment of your co-workers, leads me to conclude that the charge of insubordination/threatening a supervisor alone, is reason enough to sustain your removal.

(A-125 (emphasis added).) Aside from not being included in the Notification of Proposed Removal, the charge of solicitation of murder had been investigated and found to be without substance prior to the March 8, 1989 date of the removal notice (A-45).

On April 3, 1989, Mr. Dunbar appealed his termination to the Merit Systems Protection Board (MSPB) (A-2), and on April 18 and 19, 1990 a hearing was conducted before an Administrative Judge (AJ) appointed by the MSPB. On June 25, 1990, the AJ issued her Initial Decision

affirming the agency's action in removing Mr. Dunbar (A-1, A-37). On August 8, 1990, Mr. Dunbar filed a petition for review of the AJ's decision with the MSPB, which summarily denied said petition on November 9, 1990 without addressing any of Mr. Dunbar's legal contentions (A-40, A-41).

Mr. Dunbar thereafter appealed the MSPB's final decision to the Federal Circuit Court of Appeals pursuant to 5 U.S.C.A. § 7703(b)(1). On July 30, 1991, the United States Court of Appeals for the Federal Circuit handed down its Decision vacating the decision of the MSPB (A-43, A-44). The Federal Circuit concluded that "[t]o the extent McCullah considered the solicitation of murder charge in arriving at his decision to re-

move Dunbar, as his removal states that he did, he erred" (A-47-48). The appeals court further ruled that "[u]nder the circumstances of this case, this error cannot be considered harmless and the MSPB finding to the contrary is not in accordance with [5 U.S.C.] § 7703(c)(2)" (A-48 (emphasis added)).[2]

The Federal Circuit therefore remanded the matter with the following directions:

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[2]5 U.S.C. § 7703(c)(2) requires the Federal Circuit to set aside agency actions found to be obtained without procedures required by law, rule or regulation having been followed. Mr. Dunbar had alleged that the Navy violated 5 C.F.R. § 752.404(f), which states that "[i]n arriving at its decision, the agency shall not consider any reasons for action other than those specified in the [Notification of Proposed Removal]." The Federal Circuit specifically found that "no mention of the solicitation [of murder] charge appears in the Notification of Proposed Removal" (A-47).

> The MSPB is directed to have the decision to remove redetermined based on the issues raised in the "Notification of Proposed Removal" and the record that would have properly been before the deciding official, and without any consideration of the allegation of solicitation for murder.

(A-48 (emphasis added).)

On remand, however, the MSPB did not follow these directions by remanding the matter to the Navy to have the decision to remove Mr. Dunbar redetermined. Instead, by an Opinion and Order dated February 14, 1992, the MSPB remanded "the appeal" to the AJ "for further proceedings in accordance with the [Federal Circuit's] opinion" and "to ascertain the appropriate penalty" (A-50).[3] On June

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[3]Specifically, the MSPB directed the AJ to

10, 1992, over Mr. Dunbar's objection, the AJ conducted a second hearing "for the purpose of taking additional testimony from Deciding Official McCullah," as well as from two other U.S. Navy officials involved in the original removal process (A-58). On June 23, 1992, the AJ issued her second Initial Decision in the matter in which she concluded, directly contrary to the Federal Circuit's hold-

---

> take additional testimony as necessary from the parties and relevant witnesses and . . . make appropriate credibility determinations to ascertain the appropriate penalty based on the charges in the Notification of Proposed Removal and the record that would properly have been before the deciding official, without any consideration of the allegation of solicitation for murder, as directed by the court.

(A-50.)

ing, that "even though there was error, it was not harmful" (A-99).[4] She again affirmed the agency's removal action (A-108).

By Order dated November 3, 1992, the MSPB denied Mr. Dunbar's petition for review of the AJ's second Initial Decision (A-110), which thereupon became the MSPB's final decision in the matter. On July 9, 1993, a different panel of the

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[4]The AJ concluded as follows on the matter of harmful error:

> In sum, I find that absent Donaldson's erroneous inclusion of the solicitation for murder allegation in the decision letter, the evidence plainly shows that McCullah, the deciding official would have reached the same decision regarding the penalty. Thus, even though there was error, it was not harmful. See 5 C.F.R. § 1201.56(b).

(A-99.)

Federal Circuit affirmed the MSPB's decision per curiam and without opinion (A-113-14). On September 7, 1993, the Federal Circuit denied Mr. Dunbar's combined petition for rehearing and suggestion for rehearing en banc (A-115-16).

REASONS FOR GRANTING THE PETITION

1. Once "set aside" on appeal by the reviewing court, an agency's removal decision is void ab initio and cannot be reaffirmed by the MSPB. This petition presents a very important question of federal law concerning the duties of the MSPB upon the remand of a matter wherein the Federal Circuit Court of Appeals has "set aside" a federal agency's action in removing an employee for harmful procedural error under 5 U.S.C.A. § 7703

(c)(2). The language of the Civil Service Reform Act, its legislative history, and prior opinions of both the Federal Circuit and the former Court of Claims strongly indicate that, once the Federal Circuit has set aside an agency's removal action, the MSPB is under a duty to treat the removal decision as void ab initio and to order the removed employee reinstated with back pay. This Court should therefore grant the petition to decide this important issue and remedy the injustice done to Mr. Dunbar, who has been robbed of his victory in the reviewing court by the unauthorized and illegal actions of the MSPB.

Section 7703(c)(2) specifically mandates that the Federal Circuit "shall" hold unlawful and "set aside" any agency

action found to be "obtained without procedures required by law, rule, or regulation having been followed." 5 U.S.C.A. § 7703(c)(2). The term "set aside" has generally been defined by both federal and state courts as meaning to reverse, annul, cancel, vacate, void, or revoke. E.g., Migdol v. United States, 298 F.2d 513, 516 (9th Cir. 1961); Ambiance Associates v. Kilby, 230 Va. 60, 334 S.E.2d 556, 557 (1985); Washington v. Levinson, 66 Ohio App. 461, 35 N.E.2d 161, 163 (1941); see Black's Law Dictionary 1230 (5th ed. 1979). Thus, when an action is "set aside," it is "annulled and made void, just as if it had never been."

Migdol v. United States, supra, 298 F.2d at 516.[5]

While the legislative history of the Civil Service Reform Act does not shed much light directly on the meaning of the term "set aside" as used in § 7703(c), that history does make it clear that "agency actions should be reversed because the agency's procedures were in error only if the procedures followed sub-

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[5]Indeed, for purposes of the former Federal Youth Corrections Act, requiring the automatic "set aside" of a youth offender conviction under certain circumstances, 18 U.S.C. § 5021 (repealed 1984), this Court indicated that the term "set aside" was used in the sense of "expunged." See Tuten v. United States, 460 U.S. 660, 664-65, 665 n.9 (1983). See also United States v. Hidalgo, 932 F.2d 805, 807 (9th Cir. 1991), holding that a youthful offender conviction that was "set aside" under Cal. Welf. & Inst. Code § 1772 (West 1984) was "expunged" under federal sentencing guidelines and could not be included in determining criminal history.

stantially prejudiced the rights of the employees." S. Rep. No. 969, Pub. L. No. 95-454, 95th Cong., 2d Sess. 64 (1979) (emphasis added). Moreover, it is apparent that § 7703(c) was modeled after § 706(2) of the Administrative Procedure Act (APA), which provides that the reviewing court "shall . . . hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law." See 5 U.S.C.A. § 706(2)(D) (West 1977) (emphasis added). As used in § 706(2), the term "set aside" has commonly been understood to mean "vacated" or "reversed." See, e.g., Camp v. Pitts, 411 U.S. 138, 143 (1973).

Moreover, the former Court of Claims expressed the view, albeit in dicta, that when a court decides to set aside agency

action as unlawful under § 7703(c), it is "required to remand the case to the Merit Systems Protection Board with instructions to determine the amount of back pay and related benefits due and to reinstate him." Brewer v. United States Postal Service, 647 F.2d 1093, 1099 & n.5 (Ct. Cl. 1981), cert. denied, 454 U.S. 1144 (1982). Similarly, the Federal Circuit has directly held that it has the "same authority" under § 7703(c) and 28 U.S.C. § 1295(a)(9) to instruct the Board, on remand from a decision setting aside an agency removal action, to issue an order requiring reinstatement and payment of back pay and other benefits. Sullivan v. Department of Navy, 720 F.2d 1266, 1276 & n.3 (Fed. Cir. 1983). These holdings reflect the basic understanding of the

federal reviewing courts, up until the decision of the panel below, that a reviewing court's decision to set aside an agency's removal action voids that action from its inception, thus requiring the reinstatement of the removed employee with back pay and benefits.

In the case at bar, the first panel of the Federal Circuit to hear this case set aside the agency's removal action for harmful procedural error under § 7703 (c)(2). Upon the reviewing court's remand of the matter to the MSPB, the Board was accordingly under a duty to treat the removal action as void ab initio and to further remand the matter to the Department of the Navy for a redetermination of the voided action in accordance with the Federal Circuit's instructions. This

duty arose not only in view of the provisions of the Act, see 5 U.S.C.A. § 7701(c) (2)(A), providing that "the agency's decision may not be sustained . . . if the employee . . . shows harmful error in the application of the agency's procedures in arriving at such decision" (emphasis added), but also was dictated by the Board's own regulations. See 5 C.F.R. § 1201.56(b)(1) (requiring the Board to "overturn" an agency action if the appellant "[s]hows harmful error in the application of the agency's procedures in arriving at its decision"). By necessary implication, the Board was further required to make Mr. Dunbar whole by ordering him reinstated with back pay.

The Board violated these duties arising under the Civil Service Reform Act and its own regulations when it remanded the matter to the AJ to take additional testimony, make credibility determinations, and "ascertain an appropriate penalty" (A-50), and thereafter reaffirmed the Navy's original removal action. By continuing to treat the agency's removal action as capable of being reaffirmed, when in fact that decision had been set aside and entirely voided by the Federal Circuit's July 30, 1991 decision, the Board erred as a matter of law.

As the Board could not breathe life back into the voided removal action by its improper remand to the AJ, its decision to reaffirm the Navy's removal ac-

tion must likewise be set aside as unauthorized and unlawful. This Court should therefore grant the Petition to clarify the nature and scope of the Board's duties upon a remand from a reviewing court's decision setting aside an agency's removal action, as well as to correct the grave injustice that has been done Mr. Dunbar by the Board's refusal to treat the Navy's original removal action as a nullity following the Federal Circuit's July 30, 1991 decision setting aside that action.

2. The MSPB violated the law of the case by refusing to obey the mandate of the reviewing court. The decision of a federal appellate court establishes the law binding further action by another body subject to its authority. Briggs v.

Pennsylvania Railroad, 334 U.S. 304, 306 (1948); United States v. United States District Court, 334 U.S. 258, 263-64 (1948). This "law of the case" doctrine is as applicable in instances of remand to administrative agencies as it is with respect to remands to lower courts. Rios-Pineda v. United States Department of Justice, INS, 720 F.2d 529, 532 (8th Cir. 1983), rev'd on other grounds, 471 U.S. 444 (1985); City of Cleveland, Ohio v. Federal Power Commission, 561 F.2d 344, 346 (D.C. Cir. 1977).

Thus, an administrative agency is bound on remand to apply the legal principles laid down by the reviewing court. United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 406 (1965); FCC v. Pottsville Broadcasting Co., 309 U.S.

134, 145 (1940);[6] Chicago & Northwest Transportation Co. v. United States, 574 F.2d 926, 930 (7th Cir. 1978); Morand Brothers Beverage Co. v. NLRB, 204 F.2d 529, 532-33 (7th Cir.), cert. denied, 346 U.S. 909 (1953). An administrative agency is without power to do anything which is contrary to either the letter or the spirit of the mandate construed in the light of the appellate court's opinion. City of Cleveland, Ohio v. Federal Power Commission, supra, 561 F.2d at 346. Moreover, an administrative agency is without power to open or modify the judgment or order of the appellate court.

---

[6]This Court in FCC v. Pottsville Broadcasting Co., supra, stated that "[o]n review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction." Id. at 145.

Mefford v. Gardner, 383 F.2d 748, 758 (6th Cir. 1967). Deviation from the court's remand order in the subsequent administrative proceedings is therefore legal error, subject to reversal on further judicial review. Sullivan v. Hudson, 490 U.S. 877, 886 (1989).

In the case at bar, the MSPB clearly exceeded the scope of the Federal Circuit's mandate and thereby violated the law of the case. The July 30, 1991 decision of the Federal Circuit directed the Board to "have the decision to remove redetermined based on the issues raised in the 'Notification of Proposed Removal'" (A-48 (emphasized added)). When this language is construed in light of the Federal Circuit's opinion setting aside the Navy's removal action for harm-

ful procedural error under 5 U.S.C. § 7703(c)(2), it is crystal clear that the mandate required the Board to remand the matter to the Navy to allow it to "redetermine" the removal decision without consideration of the solicitation of murder charge.

Instead, the Board, by its remand to the AJ, purported to reopen and take additional testimony and evidence on the question of whether the Navy's consideration of the solicitation of murder charge constituted harmful procedural error, an issue of law already expressly decided and foreclosed by the Federal Circuit's decision. The Board thereafter reaffirmed the Navy's removal action based on the AJ's conclusion that "even though there was error, it was not harmful

error" (A-99). In effect, the Board improperly chose to ignore the Federal Circuit's decision "as if it had no force or effect." Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir.), cert. denied, 449 U.S. 975 (1980).

As "[t]his is intolerable if the rule of law is to prevail," 623 F.2d at 228, this Court should exercise its supervisory authority and grant the Petition to correct the Board's clear and unjust violation of the Federal Circuit's mandate.

3. The Federal Circuit violated the law of the case by refusing to enforce the mandate of a prior panel. It is well established that appellate reconsideration of issues that have already been decided in an earlier appeal is or-

dinarily foreclosed by the "law of the case" doctrine. E.g., Chicago & Northwest Transportation Co. v. United States, supra, 574 F.2d at 929. "While power rests in a federal court that passes on an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review." Insurance Group Committee v. Denver & Rio Grande Western Railroad, 329 U.S. 607, 612 (1947). As a rule a court "should be loathe" to revisit prior decisions of its own "in the absence of extraordinary circumstances." Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817 (1988).

In the instant case, the Federal Circuit did not even bother to articulate a single reason, let alone an "unusual" or "extraordinary" circumstance, justifying its departure from the opinion of the prior panel. Nor does the record of this case reveal any compelling reason for the Federal Circuit to refuse to enforce the mandate of the prior panel decision. As the Federal Circuit's decision thus violates the principles of the "law of the case" as laid down by this Court and the other federal circuit courts of appeals, this Court should grant the Petition to bring the Federal Circuit in line with this fundamental rule of law.

CONCLUSION

In view of the arguments and authorities set forth above, the Petitioner, John P. Dunbar Jr., respectfully requests that this Court grant this Petition and issue a writ of certiorari to the Federal Circuit Court of Appeals.

Respectfully submitted,

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

JOHN P. DUNBAR, JR., Appellant,	)	DOCKET NUMBER SF07528910445-1
v.	)	
DEPARTMENT OF THE NAVY, Agency.	)	DATE: June 25, 1990

John P. Dunbar, Esquire, Honolulu, Hawaii, for the appellant.

John M. Shea, Esquire, Washington, D.C., for the agency.

BEFORE

Gretchen W. Thomas
Administrative Judge

INITIAL DECISION

INTRODUCTION

On April 3, 1989, appellant appealed his removal from the position of Training Instructor, effective March 11, 1989.[1] The Board has jurisdiction over the appeal. 5 U.S.C. §§ 7511-7513 and 7701(a).

For the reasons set forth below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Appellant was removed on charges of: 1) Absence without Leave(AWOL)/failure to follow leave procedures, 2) leaving the work site without permission, and 3) insubordination/threatening a supervisor.

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[1] On February 27, 1990, the Board held that appellant had shown good cause for the untimeliness of his appeal, and waiving the time limit, remanded the appeal for adjudication on the merits. *Dunbar v. Department of the Navy*, 43 M.S.P.R. 640 (1990).

Charge 1

The specifications underlying Charge 1, allege that appellant was AWOL on January 23, 24, and 25, 1989, and that he failed to request leave in accordance with the agency's leave procedures. Appellant does not dispute that he was absent between January 23 and 11:00 a.m. on January 25. However, he maintains that he was sick during that time, that he notified his supervisor of his illness, and upon his return, presented medical documentation to support his absence. I find appellant's claims lacking in credibility. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987).

Hospital records submitted by appellant show that he was seen at the Coronado Hospital Emergency Room at 11:30 p.m. on January 19th and diagnosed as having purulent bronchitis. Medication

was prescribed for his condition and he was sent home. *See* Agency Exhibit 11. However, the documents give no opinion as to the seriousness or expected duration of appellant's condition.

At the hearing, appellant proffered a standard Application for Leave form requesting sick leave for the period from January 19 through 11:00 a.m. on January 25. The application, dated February 6, 1990, shows that on March 3, 1990, a Dr. F. X. O'Brien certified that appellant was under his care for the period indicated and that his condition made reporting to work inadvisable. I do not credit the leave request with probative value.

Appellant testified that the only medical care that he received for his bronchial condition was at Coronado Hospital on January 19. Yet, the attending physician's signature on the Coronado

medical records is clearly different from that of Dr. O'Brien. It appears to be of a Dr. J. Ammur (sic). Under the circumstances, I find that when Dr. O'Brien signed the certification on March 3, 1990, without having examined appellant during the relevant time period, he could not have reasonably opined whether appellant was incapacitated from duty approximately 5 weeks earlier on January 23-25. To arrive at an accurate diagnosis both medical history and physical examination are needed. *Cf. Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 418 (1981).

In addition, a United States Naval Reserves muster record shows that appellant reported, and was present, for reserve training on the week-end of January 20-22. Agency file, Tab I. Appellant admits that he had reported for reserve

duty, but testified that because he was ill, his superior officer, LCDR. G.J. Bonelli, excused him and that he had spent the week-end in bed.

LCDR G.J. Bonelli testimonially corroborated that appellant reported for reserve duty on January 20. He also testified that appellant appeared ill. However, he denied excusing appellant to go home. He testified that he only relieved appellant from participating in the physically demanding training exercises, but not from the classroom exercises.

I find LDCR Bonelli's testimony more credible than appellant's. *See Hillen*, 35 M.S.P.R. at 460. While an admitted friend of appellant, Bonelli basically had no reason to testify untruthfully before the Board in a matter in which he had no vested interest. Indeed, if he had acted as appellant claims, he him-

self could have been subject to charges of misconduct.[2] By contrast, I find that appellant had every reason to attempt to overcome the extremely damaging evidence of his activities on January 20-22, by representing that his reserve duty status was different than it appeared. Under the circumstances, I find it more likely than not that appellant was present for the classroom exercises. Thus, in the absence of any evidence that his condition deteriorated, I find it unlikely that appellant was incapacitated by illness from fulfilling his duties to the agency to conduct classroom training sessions the following Monday through Wednesday. Moreover, even if appellant was

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[2] For the signatory mustering officer to excuse a Reservist from duty while representing that he was present for purposes of pay might well result in charges of fraud, or conspiracy to defraud.

ill between January 20-22, it does not serve to establish that he was also ill on the 23-25. *See Roberson v. Veterans Administration*, 27 M.S.P.R. 489, 492 (1985).

Even assuming that appellant was ill on January 23-25, I find that he failed to follow the applicable procedures for requesting leave. The agency's leave regulations provide that

> An employee who is absent on sick leave will notify his immediate supervisor within the first hour of the work shift on each day of the absence unless specifically told otherwise by his supervisor. If the immediate supervisor is unavailable, the employee will proceed up through the chain of command until notification can be made.

Agency file, Tab Q.

Appellant presented documentary and testimonial evidence that he telephoned his supervisor, Jerry Thurber, on January 20, to advise him that he was ill and that he might not be able to travel on the 22nd as scheduled. *See* Appellant's Exhibit O. However, there is no evidence that appellant notified his supervisor on January 23, 24, or 25. Indeed, appellant admitted that although he attempted to telephone his supervisor on the 23rd, he was unsuccessful. He also admitted that he made no attempt to call his supervisor, or anyone else in authority, on either the 24th or 25th.

Nevertheless, appellant maintains that when he called on January 20, Thurber excused him from the daily call-in requirement and that he had attempted to call on the 23rd out of distrust. He

specifically testified that when he advised Thurber of his illness and possible inability to travel to the training session he was scheduled to conduct in Alameda, Thurber told him that it was okay; that he could go when he was feeling better. Appellant also submitted an affidavit corroborating his testimony from a friend who eavesdropped on the conversation, Gita Singh.

I find appellant's claim lacking in credibility. Generally, it would be unreasonable for an ordinary employee to assume, without more, that he was relieved from keeping his employer apprised of his condition, as required, solely on the basis of the alleged comment. But, appellant was no ordinary employee. He was an employee under orders to travel for the purpose of conducting training sessions and he was indefinite about when

he could carry out this assignment. Under such circumstances, I find it simply not credible for appellant, as a reasonably prudent person, to have assumed, without clarification, that he was relieved from the requisite call-in procedures.

Accepting appellant's professed distrust of Thurber's representation as true, I also find it incredible that he would have ceased his alleged efforts to contact his supervisor, or someone else in authority, after the unsuccessful attempt on the 23rd. *See Hillen*, 35 M.S.P.R. at 461. Appellant was well aware of the office routine, and if he had called, he would have ultimately reached Thurber, or the secretary, or a co-worker. Appellant also had Thurber's home telephone number and could have attempted to contact him there, as he did

on the 19th. Yet, other than the alleged attempt on the 23rd, appellant made no effort to call the agency. Moreover, appellant was well aware of the need to follow the agency's leave policies, having received a Letter of Admonishment approximately 5 months before. *See* Agency Exhibit 38.

And, while the Board has may examine medical evidence to which the agency was not privy at the time of its decision[3] to determine whether an employee was prop-

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[3] Appellant testified to having handed the excuse to his supervisor on a date when he was banned from the workplace. When given an opportunity to rehabilitate the inconsistency, appellant's attorney argued that it was submitted in response to the proposed removal. However, based on careful review of the response to the proposed removal prepared by Robert C. Anderson, Esquire, I find that none of the referenced documentary evidence being submitted pertains to the leave slip. *See* Agency file, Tab C. Thus, I conclude that appellant never submitted the leave slip prior to his removal.

erly charged AWOL, *see McKinney v. Veterans Administration*, 35 M.S.P.R. 412, 414 (1987), as discussed above, I do not find Dr. O'Brien's certification probative. Thus, I find that a preponderance of the evidence establishes that appellant failed to follow leave procedures.

Finally, with regard to appellant's claim that he was in a duty status after 11:00 a.m. on January 25, I find that he was improperly charged AWOL for the time in which he was enroute to the training session. However, I also find that the time which appellant spent attempting to locate the training site may properly be charged as AWOL. While appellant obviously could not anticipate that the training location would unexpectedly change, he would have learned of the change had he contacted the agency at any time between the 23rd and the 25th.

Appellant could also have contacted his office upon discovering that there was no training being conducted at the originally designated location and quickly ascertained the correct location. I find that his failure to undertake these prudent measures wasted time and deprived the government of his services for, at least, 1-2 hours. As such, I find that he was AWOL. *Cf. Mitchell v. Department of Defense*, 22 M.S.P.R. 271, 273 (1984)(An agency may charge an employee AWOL for engaging in non-work related activity during duty hours).

In sum, I find that the preponderance of the evidence establishes that appellant was AWOL on January 23-25. The fact that he was improperly charged AWOL for the brief period that he was traveling on the 25th, does not alter the

gravamen of the charge. The charge is sustained.

Charge 2

The agency charged that on February 6, 1989, appellant left the work site without permission and did not return prior to the end of his work-shift approximately 4 and 1/2 hours later. Appellant admits that he left work without permission. Nevertheless, he contends that his action was justified. Specifically, appellant testified that on the morning of the 6th, he received his time and attendance report for the prior pay period from Thurber. It showed 33.5 hours of AWOL.[4] Believing that Thurber was unjustifiably and maliciously denying him the sick leave to which he was en-

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[4] The time and attendance report was for the pay period in which appellant's absence discussed in Charge 1 occurred.

titled, he determined to consult his attorney. Appellant submitted a request for compensatory leave. Thurber denied the leave and an argument ensued. Thurber ultimately ordered appellant to go to back to his desk and get to work, but appellant was so upset and ill as a result of the argument, that he filled out a request for sick leave, dropped it on the secretary's desk, and left.

A letter dated April 4, 1989 from Dr. Kevin Patrick corroborates appellant's testimony that he was upset. Dr. Patrick states that he saw appellant as a patient on February 6 and that he was obviously upset and stressed. He states that he prescribed a mild anxiolytic and advised appellant to take 2-3 days away from work. In addition, Robert Anderson, Esquire, testified that appellant called him at approximately 10:30 on the Febru-

ary 6 and that appellant seemed extremely upset. Anderson testified that he advised appellant to see a doctor.

I find that while appellant may well have been physically and emotionally upset as a result of his confrontation with Thurber, his condition was not such that it was urgent that he leave. There is no evidence of the onset of violent illness, such as vomiting. Neither is there evidence that appellant was emotionally out of control. He was able to contact his attorney immediately upon exiting the agency premises and he was able to arrange, and appear for, an appointment with Dr. Philips later in the day at a location some distance from the agency. Thus, I conclude that there was no reason why appellant could not have sought permission to leave, and even if permission

was denied,[5] that he could not have remained at work for the remainder of the day. Accordingly, I find that appellant's admission that he left work without permission, coupled with lack of any credible evidence of an emergency, suffices to establish that the conduct charged occurred. The charge is sustained. *See Henry v. Veterans Administration*, 25 M.S.P.R. 159, 161 (1984).

Charge 3

The specifications underlying Charge 3 allege that on February 6, during the argument concerning the 33.5 hours of AWOL and the denial of his request for compensatory leave, appellant was insubordinate/ threatened Thurber. Specifically, the agency alleged that appellant

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[5] There is some evidence which suggests that during the argument appellant told Thurber that he was ill and had to leave, but that Thurber ignored, or disbelieved him.

told Thurber that he was going to do him in and when Thurber responded that appellant was being insubordinate, he walked away, stating: "I'll get you good."

In *Metz v. Department of the Treasury*, 780 F.2d 1001 (Fed. Cir. 1986), the Federal Circuit Court of Appeal set forth those factors which the Board is to consider in determining whether an employee threatened supervisors or coworkers. *Id.* at 1002. Those factors include the listeners reaction and apprehension of harm, the speaker's intent, any conditional nature of the statements, and the attendant circumstances.

Applying the *Metz* factors to the evidence in this case, I find that a preponderance of the evidence supports the agency's charge. Thurber testified that based on his experience as a soldier and chief of police, he believed the threat

to be real. He stated that he was afraid that appellant would either return to the work-place to carry out his threat or attempt an attack by stealth on him or his family at home. He immediately reported the matter to Dick Donaldson in the agency's Labor Relations office. He also notified George Riddick at the agency's Washington, D.C. headquarters and certain members of his family. Thurber further testified that he took various security precautions, such as moving his desk away from the window and locking the office door. He also changed the locks on his home, changed his driving patterns and installed a security system.

Fricks and Laura Angelo, the secretary, both of whom were in the immediate area at the time of the incident, corroborated Thurber's testimony. Fricks testified that based on his observations

of how angry appellant was and his knowledge of appellant's military training as a Seal, he was concerned that the office might become the subject of a mass killing, similar to those carried out by disgruntled employees at the Post Office and Pacific Southwest Airlines. He confirmed that they immediately locked the doors and testified that, like Thurber, he changed his routine for a time. Angelo testified that she heard appellant tell Thurber he was going to get him. She also testified that she was "holding her breath" during appellant's outburst and that she was afraid for Thurber and herself.

On the other hand, appellant categorically denied any wrong doing. He testified that although he was upset, he did not become angry or raise his voice; that flying off the handle was not his

way of handling things. I interpret appellant's testimony as a denial of intent. Nevertheless, he admits telling Thurber that he was fooling with the wrong person; that the truth would come out. While it is unclear from the remark whether appellant intended physical harm, given the circumstances, I find that the statement was, at the very least, a veiled threat.

Moreover, considering appellant's perception that he was being repeatedly wronged; his own witnesses' testimonies that he was confrontational and a loner; his attempt to suborn the testimony of a witness[6] and his own generally inconsis-

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[6] The record reflects that following the first day of hearing, appellant telephoned a witness who was to testify the following day, Walter Dotson, and attempted to influence his testimony.

tent[7] and evasive[8] testimony, I find appellant's efforts to portray his conduct as unthreatening not credible.

In sum, I find that the agency has established by preponderant evidence that appellant threatened his supervisor. The charge is sustained.

AFFIRMATIVE DEFENSES

Procedural Error

Appellant alleges that the agency committed harmful procedural error by violating his due process rights. Specifically, appellant contends that the deciding official, Lanny McCullah, denied him the impartial, independent decision to which he is entitled because McCullah relied on the proposing official, Dick Donaldson, to prepare the Decision Let-

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[7] Appellant's impeached testimony concerning the leave slip.

[8] . Appellant's impeached testimony concerning his training.

ter. Appellant also contends that McCullah improperly based his decision of allegations of misconduct which were not a part of the proposal notice, thereby denying appellant his right to reply. I find no merit in appellant's contentions.

With regard to the allegation of communication between the proposing and deciding official, I find that, at the outset appellant, is mistaken. The proposing official was appellant's supervisor, Jerry Thurber, not Donaldson. And, while Donaldson, as the agency's Labor Relations officer, may well have played a role in the preparation of both the Proposal and Decision Notices, I find no evidence that he either made, or improperly influenced, the decision.

McCullah testified that in making his determination, he considered the evidence supporting the agency's action, and

the evidence and reply which appellant submitted in response to the agency's action. He also testified that he took into considered the various mitigating and aggravating factors and determined that removal was the only appropriate penalty. Only then did McCullah contact Donaldson to request that he prepare the decision letter for McCullah's signature. Pursuant to his request, the two had some discussion about the case.

The Board has specifically held that it is proper for a deciding official to communicate with the proposing official, or non-adversarial parties, as a part of the decision-making process. *See Oliver v. Department of Health and Human Services*, 34 M.S.P.R. 465, 469 (1987), *aff'd*, 847 F. 2d 842 (Fed. Cir. 1988)(Table). . And, here, there is no evidence that as the Labor Relations officer, Donaldson

had any stake in the outcome of the proceedings. Moreover, even if appellant had shown that Donaldson conveyed new information to which he had no opportunity to respond,[9] there is no evidence that the deciding official considered it or that it had a harmful effect upon the outcome. *Id.* As discussed above, McCullah testified without dispute that he had made his decision prior to contacting Donaldson. More importantly, a deciding official, in fulfilling his obligation, has a responsibility to investigate and seek recommendations. *See*

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[9] Although appellant had an opportunity to cross-examine McCullah concerning his communication with Donaldson on the first day of the hearing, he did not. Instead, on the second day, he raised the defense and called for Donaldson's testimony. The request was denied because Donaldson, as technical advisor, had been present throughout the first day's proceedings. Nevertheless, appellant was afforded the opportunity to recall McCullah, but did not avail himself of the opportunity.

Farris v. Department of the Air Force, 26 M.S.P.R. 299, 303, *aff'd* 785 F. 2d 323 (1985) (Table).

Appellant's claim that the agency considered allegations of wrongdoing to which he had no opportunity to respond focuses on McCullah's references in his decision to an allegation of solicitation of murder by appellant in May 1988 and harassment of co-workers as aggravating factors in determining the penalty. The Board, however, has held that while an agency may not consider any reason not specified in the proposal notice, it is not required to designate all circumstances that could conceivably be relevant to the penalty. *See Phillips v. General Services Administration*, 38 M.S.P.R. 206, 213 (1985), *rev'd. on other grounds*, 878 F. 2d 370 (Fed. Cir. 1989). Moreover, the record does not suggest

that the agency relied on these factors to impose an enhanced penalty, since the agency Table of Penalties allows removal for a second offense in which there is a single charge of misconduct involving insubordination/threatening a supervisor. Here, of course, appellant was also charged with AWOL and leaving the work site without permission.

Harassment and Reprisal

As affirmative defenses to his conduct, appellant also alleges that he was subjected to a pattern of on-going harassment by Thurber, that his removal was preconceived and in retaliation for his testimony to investigators concerning per-diem fraud by Thurber. Such allegations, if proven, would constitute prohibited personnel practices under 5 U.S.C. § 2032.

Based on careful review of the 19 incidents identified by appellant as supporting his claim, I find a paucity of evidence that the agency's actions amount to violations of the statutory prohibitions. For example, numerous incidents merely relate to appellant's disagreement with matters exclusively within the agency's discretion, i.e., authorizing training, denying him a bonus, denying Leave without pay, and precluding him from personally collecting his belongings after placing him on administrative leave pending a decision on his proposed removal.

With regard to some of the other incidents, appellant never offered sufficient evidence as to the nature of the action for a determination to even be made as to whether it was justified or harassment, i.e. denying appellant the

right to exercise at lunch time, extorting $150.00 of appellant's per diem money.

I also find insufficient evidence to support appellant's allegation that Thurber's actions following the "Japan" incident were a pretext to fire him. Contrary to appellant's assertions, the fact that in filing a report about appellant's conduct in Japan, Thurber initially indicated that he was going to remove appellant, and later substituted the word "suspension," *see* Appellant's Exhibit L, is simply not evidence of a preconceived plan. If anything, it indicates that while Thurber viewed appellant's conduct in Japan as warranting removal, he was willing to give him another chance. I also find insignificant the fact that the agency's decision to deny appellant's within-grade increase on the premise that

his conduct in Japan constituted unsatisfactory performance was overturned by the Board for harmful procedural error. The plain fact is that appellant was suspended for 14 days for his conduct in Japan and, although afforded the opportunity grieve the matter, the disciplinary action remains.

I also find that appellant has failed to meet his burden of establishing a prima facie case that his removal was reprisal for his protected activity. To establish reprisal, the appellant bears the burden to show that he engaged in protected activity, that he was subsequently treated in an adverse fashion, and that the deciding official had actual or constructive knowledge of his protected activity. The appellant must also demonstrate that there is a causal connection between the protected activity

and the adverse action and that the protected activity was a significant factor in the taking of the adverse action. *See Warren v. Department of the Army*, 804 F.2d 654, 657-658 (Fed. Cir. 1986).

In the instant case, appellant's activity of giving evidence in an official investigation constitutes protected activity. However, the misconduct for which appellant's removal was proposed, as well as the proposal notice, preceded the date on which appellant indicated that he engaged in this protected activity. Thus, a causal connection is lacking. *See Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 223 (1988).

Even inferring that retaliation was a factor in the agency's decision, I find that it has established by the requisite evidence that it would have imposed the same discipline even absent a prohibited

motivation. *See Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268, 275 (1981). As discussed above, removal is within the range of penalties provided by the agency's disciplinary guidelines for the sustained misconduct. Further, Thurber and McCullah gave no testimonial indication that they harbored ill-feelings toward appellant, and appellant's co-workers opined that Thurber had been extremely patient with appellant.

In sum, I find that appellant has failed to meet his burden of establishing by preponderant evidence that his removal was a pretext for any prohibited personnel practice.

Penalty and Efficiency of the Service

It is axiomatic that absence without leave and leaving the work site without permission are offenses which, by their very nature, affect the efficiency of the

service. *Desiderio v. Department of the Navy*, 4 M.S.P.R. 84, 86 (1980). Similarly, threatening a supervisor is a serious offense which, on its face, is prejudicial to the service.

The Board has authority to review the penalty imposed to determine whether it is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Based on a careful review of the relevant penalty factors, I find no basis for disturbing the agency's decision to remove appellant.

The sustained conduct is serious. Moreover, the record shows that during appellant's less than three years with the agency, he has been suspended for 14

days for similar misconduct.[10] I find that this disciplinary action meets the requirements set out in *Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981). Thus, I find that it was appropriate for the agency to rely on it in assessing the current penalty.

Appellant contends that McCullah's consideration of the allegation of solicitation of murder for which he was placed on administrative leave was improper. There is little doubt that the allegation was made. It precipitated a formal investigation. The fact that the investigation was closed without criminal charges being instituted does not establish that the allegation itself was unfounded. Even assuming that the agency

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[10] Failure to follow a direct order, rude obnoxious and insulting behavior, and unauthorized absence/leaving the work site without permission. *See* Agency File, Tab J.

should have purged any reference to the incident from appellant's records following its investigation and that it was improper for McCullah to have considered it, I find the error harmless. Removal was a reasonable penalty simply on the basis of the seriousness of the sustained charges.

Contrary to appellant's assertions, I find that it was appropriate for McCullah to consider evidence of appellant's inappropriate behavior toward his co-workers in determining that the penalty. Intimidation and disparagement of co-workers, such as that testified to by witnesses Gary Chamberlain and Angelo, are disruptive to the work-place and service efficiency.

Appellant's satisfactory performance, his commendable action of apprehending a suspected criminal, and his

many years of exemplary service in the Reserves weigh in his favor. However, I conclude from appellant's unwillingness to accept responsibility for his actions that he does not fully appreciate the serious nature of his misconduct. Thus, I find that his potential for rehabilitation is poor. In sum, I find that appellant's removal does not exceed the bounds of reasonableness under the circumstances.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: *Gretchen W. Thomas*
Gretchen W. Thomas
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on July 30, 1990, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for nondiscrimination issues by filing a petition with the appropriate United States District Court no later than 30 calendar days after the date this initial decision becomes final.

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court of appeals before this decision be-

comes final. To be timely, your petition must be received by the court of appeals no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

RECEIVED
11/14/90

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN P. DUNBAR, JR., Appellant,	)	DOCKET NUMBER SF07528910445-1
v.	)	
DEPARTMENT OF THE NAVY, Agency.	)	DATE: NOV -9 1990

John P. Dunbar, Sr., Esquire, Honolulu, Hawaii, for the appellant.

John M. Shea, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on June 25, 1990, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor /s
Clerk of the Board

Washington, D.C.

NOTE: Pursuant to Fed. Cir. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

91-3106

JOHN P. DUNBAR, JR.,

Petitioner,

v.

DEPARTMENT OF THE NAVY

Respondent.

DECIDED: July 30, 1991

Before NEWMAN, MICHEL, and PLAGER, *Circuit Judges*.

PER CURIAM.

DECISION

Petitioner John P. Dunbar, Jr. (Dunbar) appeals the decision of the Merit

Systems Protection Board (MSPB) in *Dunbar v. Department of the Navy*, No. SF0752891-0445-1 (June 25, 1990) (made final Nov. 9, 1990) affirming his removal by the Department of the Navy (Navy) from his position of Training Instructor. We *vacate* the decision of the MSPB and *remand* with directions.

DISCUSSION

Dunbar was sent a "Notification of Proposed Removal" dated February 8, 1989 which specified three reasons for the proposed action: 1) "Absence without leave (AWOL)/failure to follow absence and leave procedures;" 2) "Leaving the worksite without permission (Second Offense);" and, 3) "Insubordination/ threatening a supervisor." Dunbar was removed by a "Notification of Removal" (removal notice) dated March 8, 1989 from Lanny McCullah, the deciding official.

In the removal notice, McCullah wrote:

> I considered the nature and seriousness of the offense. . . . [Y]our verbal threats to your supervisor are, without question, a serious offense. Such behavior affects the Naval Investigative Service's obligation to maintain a safe work place for its employees, thus impinging upon the efficiency of the Navy. Your violent outburst and aggressive behavior in this instance, coupled with a May 17, 1988 allegation of solicitation for murder, for which you were placed on administrative leave, and your continued harassment of your co-workers, leads me to conclude that the charge of insubordination/threatening a supervisor alone, is reason enough to sustain your removal.

Dunbar argues that the charge of solicitation for murder was not included in the Notification of Proposed Removal;[1] that

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[1] Dunbar also notes that the charge was investigated and found to be without substance prior to the March 8 date of the removal notice.

McCullah was made aware of this charge through impermissible contacts with Dick Donaldson, the Navy's Labor Relations officer; and that because no mention of the solicitation charge appears in the Notification of Proposed Removal, Dunbar had no opportunity to defend himself against the charge at the agency level. Dunbar also alleges that the Navy violated 5 C.F.R. § 752.404(f) (1991) which states that "[i]n arriving at its decision, the agency [i.e., McCullah] shall not consider any reasons for action other than those specified in the [Notification of Proposed Removal]." It is clear that no mention of the solicitation charge appears in the Notification of Proposed Removal.

The Administrative Judge found "no evidence that [McCullah] considered [information to which Dunbar had no oppor-

tunity to respond, i.e., the solicitation charge,] or that [such information] had a harmful effect upon the outcome." *Dunbar at 38*. Because no mention of the solicitation charge appears in the Notification of Proposed Removal, but the charge is used by McCullah in the removal notice to support the removal decision, the removal notice itself belies this finding.

In reviewing a MSPB decision, this court must set aside agency actions, findings, or conclusion found to be: 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; 2) obtained without procedures required by law, rule or regulation having been followed; or 3) unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1988). To the extent McCullah considered the solicitation for murder charge in arriving at his decision to re-

move Dunbar, as his removal notice states that he did, he erred. Under the circumstances of this case, this error cannot be considered harmless and the MSPB finding to the contrary is not in accordance with § 7703(c)(2). The MSPB is directed to have the decision to remove redetermined based on the issues raised in the "Notification of Proposed Removal" and the record that would properly have been before the deciding official, and without any consideration of the allegation of solicitation for murder.

91-3106

RECEIVED
2/19/92

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN P. DUNBAR, JR., Appellant.	DOCKET NUMBER SF0752890445-1-1
v.	
DEPARTMENT OF THE NAVY, Agency.	DATE: FEB 14 1992

John P. Dunbar, Sr., Esquire, Honolulu, Hawaii, for the appellant.

John M. Shea, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This appeal has been remanded to the Board by the United States Court of Appeals for the Federal Circuit. *Dunbar v. Department of the Navy*, No. 91-3106 (Fed. Cir. July 30, 1991). The Board hereby REMANDS the appeal to the San Francisco Regional Office for further proceedings in accordance with the court's opinion. The administrative judge shall take additional testimony as necessary from the parties and relevant witnesses and shall make appropriate credibility determinations to ascertain the appropriate penalty based on the charges in the Notification of Proposed Removal and the record that would properly have been before the deciding official, without any consideration of the allegation of solicitation for murder, as directed by the court.

In addition, the Board directs the parties to file with the Regional Office, within 20 days of the date of this Order, copies of any briefs or other submissions relating to the merits of the appeal which were filed with the Federal Circuit and which have not already been provided to the Board. The parties need not file copies of motions to the Federal Circuit for extensions of time or other submissions to the court not addressing the merits.

Finally, we DENY the appellant's motion for reinstatement and back pay because such relief has not been ordered by the court and because there has not yet been a final decision of the Board that the appellant is the prevailing party.

FOR THE BOARD:

Robert E. Taylor /s
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

JOHN P. DUNBAR, JR., Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER SF0752890445-B-2 DATE: June 23, 1992

Owen L. Cedarburg, Esquire, Alexandria, Virginia, and John P. Dunbar, Sr., Esquire, Honolulu, Hawaii, for the appellant.

Major T.P. Cook, Esquire, Washington, D. C., for the agency.

BEFORE

Gretchen W. Thomas
Administrative Judge

INITIAL DECISION

INTRODUCTION

On July 30, 1991, the United States Court of Appeals for the Federal Circuit

vacated the Board's final decision in *Dunbar v. Department of the Navy*, MSPB Docket No. SF07528910445-1 (June 25, 1990) and remanded the case to the Board with directions. *Dunbar v. Department of the Navy*, No. 91-3106 (Fed. Cir. July 30, 1991). The Board has now remanded the appeal to the Board's San Francisco Regional for further proceedings in accordance with the court's opinion. *Dunbar v. Department of the Navy*, MSPB Docket No. SF0752890445-M-1 (Opinion and Order, Feb. 14, 1992).

For the reasons set forth below, the agency's action is AFFIRMED.

APPELLATE HISTORY

The agency removed appellant from the position of Training Instructor, on charges of Absence without Leave, Leaving the Work-site Without Permission, and Insubordination/Threatening a Supervisor,

effective March 11, 1989. Appellant appealed to the Board after the expiration of the Board's 20-day filing requirement. The appeal was subsequently dismissed as untimely based on findings that appellant failed to show good cause for waiver of the time limit. Appellant filed a Petition for Review with the Board. On February 27, 1990, the Board granted appellant's petition, reversed the Initial Decision and remanded the appeal to the San Francisco Regional Office for adjudication.

Following a 2-day hearing, an Initial Decision was issued on June 25, 1990. The decision affirmed the agency's action, finding that the agency's 3 charges were supported by the requisite evidence, that appellant did not meet his burden of establishing his affirmative defenses of procedural error, harassment

and reprisal, that his conduct affected the efficiency of the service, and that his removal was within the bounds of reasonableness.

Appellant filed a 132-page Petition for Review with the Board. By Order dated November 9, 1990, the Board dismissed appellant's petition on the grounds that it did not meet the criteria for review and the Initial Decision became final.

Appellant petitioned the United States Court of Appeals for the Federal Circuit for review of the Board's decision. In his petition, appellant presented four issues, but when the court rendered its decision on July 30, 1991, it considered appellant's arguments on only one of the issues presented, i.e., harmful procedural error.

In its decision, the court found that the Initial Decision's finding that there was no evidence that the Deciding Official, Lanny McCullah, considered the allegation of solicitation of murder (allegation) or that it had a harmful effect on the outcome was belied by the fact that the allegation was used in the removal notice to support the decision. "To the extent McCullah considered the solicitation for murder charge in arriving at his decision to remove Dunbar, as his removal notice states that he did," the court stated, he erred and the error "cannot be considered harmless. . . ." The court vacated the decision and remanded the case to the Board with directions "to have the decision to remove redetermined based on the issues raised in the "Notification of Proposed Removal" and the record that would properly have

been before the deciding official, and without any consideration of the allegation of solicitation for murder."

On August 28, 1991, appellant filed a motion with the Board, seeking reinstatement and back-pay. On February 14, 1992, the Board issued an Opinion and Order denying appellant's motion and remanding the appeal to the San Francisco Regional Office for further proceedings in accordance with the court's opinion. The order specifically directed the Administrative Judge to "take additional testimony as necessary from the parties and relevant witnesses to ascertain the appropriate penalty based upon the charges in the Notification of Proposed Removal and record that would properly have been before the deciding official without any consideration of the allegation of solicitation for murder. . . ."

Pursuant to the Board's remand order, a second hearing was conducted on June 10, 1992, for the purpose of taking additional testimony from Deciding Official McCullah, as well as from two witnesses whom it appeared might have relevant testimony, Labor Relations Officer Dick Donaldson, and Proposing Official Jerry Thurber. The analysis and findings set forth below are based on the evidence presented at the second hearing and the evidence made a part of the record during the earlier proceedings.

ANALYSIS AND FINDINGS

Although the court's remand decision, as noted, was limited to the "harmful error" analysis in the Initial Decision, the court, nevertheless, vacated that decision. Accordingly, a summary of the analysis and findings on the substan-

tive charges, as well as the affirmative defenses not addressed by the court have been included in this decision.

Charge 1

The specifications underlying Charge 1 allege that appellant was absent without leave (AWOL) on January 23, 24, and 25, 1989, and that he failed to request leave in accordance with the agency's leave procedures. Appellant does not dispute that he was absent between January 23 and 11:00 a.m. on January 25. However, he maintains that he was ill during that time, that he notified his supervisor of his illness, and upon his return, presented medical documentation to support his absence. I find appellant's claims lacking in credibility. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987).

Hospital records submitted by appellant show that he was seen at the Coronado Hospital Emergency Room at 11:30 p.m. on January 19th and diagnosed as having purulent bronchitis. Medication was prescribed for his condition, and he was sent home. However, the hospital records give no opinion as to the seriousness or expected duration of appellant's condition.

At the first hearing, appellant proffered a standard Application for Leave form, requesting sick leave for the period from January 19 through 11:00 a.m. on January 25. The application, dated February 6, 1990, shows that on March 3, 1990, a Dr. F. X. O'Brien certified that appellant was under his care during the requested period and that his condition made reporting to work inadvisable.

Appellant testified that he gave the leave form to his supervisor on a date when he was banned from the work-place. When given the opportunity to rehabilitate the inconsistency, his attorney argued that it was submitted in response to the proposed removal. However, based upon my review of the appellant's response to the proposed removal, I find that the leave form was not included with his supporting documentation. Thus, I conclude that appellant did not submit the leave form prior to his removal. The Board will, however, examine medical evidence to which the agency was not privy at the time of its decision to determined whether an employee was properly charged AWOL. *See McKinney v. Veterans Administration*, 35 M.S.P.R. 412, 414 (1987). But, I find O'Brien's certification of little probative weight.

Appellant testified that the only medical care that he received for his bronchial condition was at Coronado Hospital on January 19. Yet, the attending physician's signature on the Coronado medical records is clearly different from that of Dr. O'Brien. It appears to be of a Dr. J. Ammur (sic). Under the circumstances, I find that when Dr. O'Brien signed the certification on March 3, 1990, without having examined appellant during the relevant time period, he could not have reasonably opined whether appellant was incapacitated from duty approximately 5 weeks earlier on January 23-25. To arrive at an accurate diagnosis both medical history and physical examination are needed. *Cf. Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 418 (1981).

Further, a United States Naval Reserves muster record shows that appellant reported, and was present, for reserve training on the weekend of January 20-22. Agency file, Tab 1. Appellant admits that he reported for reserve duty, but testified that because he was ill, his superior officer, LCDR. Gary J. Bonelli, excused him and that he spent the weekend in bed.

Bonelli testimonially corroborated that appellant reported for reserve duty on the evening of January 20. He also testified that appellant appeared ill and that the reserve medical doctor concurred in the assessment later that evening. Bonelli explained that he sent appellant home for the remainder of the evening, but told him to report the next morning. And, he distinctly recalled that appellant was present for muster on January 21

and 22, and that he did not excuse him to go on those days. He testified that he only relieved appellant from participating in the physically demanding training exercises, but not from the classroom exercises. *See* Transcript excerpts of first Hearing (HT1) at 8-9 and 15-18.

I find Bonelli's testimony that appellant was present for reserve duty on January 21 and 22 more credible than appellant's contradictory testimony that he was home in bed. *See Hillen*, 35 M.S.P.R. at 460. Bonelli, a long-time acquaintance, voluntarily appeared as a witness for the appellant and I find that he basically had no reason to testify untruthfully about a matter in which he had no vested interest. By contrast, I find that appellant had every reason to attempt to overcome the damaging evidence of his activities on January 20-22, by

representing that his reserve duty status was different than it appeared. Thus, I find that appellant was present for the classroom exercises.

I also find that in the absence of any evidence that his condition deteriorated, it unlikely that appellant was incapacitated by illness from fulfilling his duty to conduct classroom training sessions for the agency the following Monday through Wednesday. Stated differently, if appellant was not too ill to attend reserve classes on the weekend, it is unlikely he was too ill to conduct classroom training for the agency Monday through Wednesday. Moreover, even if I had accepted appellant's claim of illness between January 20-22, because of the relatively minor nature of the illness, it does not establish that he was too ill to conduct his training classes from Jan-

uary 23-25. *See Roberson v. Veterans Administration*, 27 M.S.P.R. 489, 492 (1985).

And, even assuming that appellant was ill on January 23-25, I find that he failed to follow the applicable procedures for requesting leave. The agency's leave regulations provide that:

> An employee who is absent on sick leave will notify his immediate supervisor within the first hour of the work shift on each day of the absence unless specifically told otherwise by his supervisor. If the immediate supervisor is unavailable, the employee will proceed up through the chain of command until notification can be made.

Agency file, Tab Q.

Appellant presented documentary and testimonial evidence that he telephoned his supervisor, Jerry Thurber, on January 20, to advise him that he was ill and that he might not be able to travel on the 22nd, as scheduled. *See* Appellant's

Exhibit O. However, there is no evidence that appellant notified his supervisor on January 23, 24, or 25. Indeed, appellant admitted that although he attempted to telephone his supervisor on the 23rd, he was unsuccessful. He also admitted that he made no attempt to call his supervisor or anyone else in authority on either the 24th or 25th.

Nevertheless, appellant maintains that when he called on January 20, Thurber excused him from the daily call-in requirement and that he had attempted to call on the 23rd out of distrust. He specifically testified that when he advised Thurber of his illness and inability to travel to the training session he was to conduct in Alameda, Thurber told him that it was okay; that he could go when he was feeling better. Appellant also submitted an affidavit to corrob-

orate his testimony from a friend, Gita Singh, who eavesdropped on the conversation. However, I find that Singh's affidavit fails to corroborate appellant's testimony. Her affidavit only states that appellant told Thurber of possible inability to travel with his co-instructors on Sunday (the 22nd). It states nothing about appellant's intentions concerning the 23rd, 24th, or 25th.

Moreover, Thurber denied excusing appellant from calling in. He testified that appellant told him he was going to be sick on Sunday and would not be going with the others and that he (Thurber) responded; "John, when you come in, you're going on that trip".

For appellant to have assumed that this statement by his supervisor served to release him from any further obligation to notify the agency of his where-

abouts on the dates in question is simply not credible. Appellant knew that the agency was depending on him to conduct training sessions for employees at another duty station. And, he also knew that his failure to appear for any portion of that training assignment would disrupt the schedule and inconvenience both the trainees and the other instructors. I find appellant's version of the conversation, contradictory, implausible, and on the whole, unworthy of belief.

I also find that appellant's admitted behavior after his alleged unsuccessful attempt to contact his supervisor on the 23rd to be inconsistent with his professed distrust of Thurber. *See Hillen* 35 M.S.P.R. at 461. Logically, if appellant distrusted Thurber, he would have wanted to ensure that his absence was properly reported. Further, appel-

lant was well aware of the office routine. Thus, he knew that if he continued to call, he would ultimately reach Thurber, the secretary, or a co-worker. Even if he erroneously believed that no one was in the office on the 23rd, he had to know that he could contact Thurber at home, as he did on the 19th. Yet, other than the alleged attempt on the 23rd, appellant admittedly made no effort to call the agency. Moreover, appellant was well aware of the need to follow the agency's leave policies, having received a Letter of Admonishment approximately 5 months before for attendance related infractions. *See* Agency, Exhibit 38.

In sum, I find appellant's testimony that he was excused from calling in is unworthy of belief. Accordingly, I find that the preponderance of the evidence

establishes that he failed to follow leave procedures.

Finally, with regard to appellant's claim that he was in a duty status after 11:00 a.m. on January 25, I find that he was improperly charged AWOL for the time in which he was in route to the training session.[1] However, I also find that to the extent appellant's work shift on the 25th had not ended on his arrival at his destination, the time which he spent attempting to locate the training site may properly be charged as AWOL. While appellant obviously could not anticipate that the training location would unexpectedly change, he would have learned of the change had he contacted the agency at any time between the 23rd and 25th. Appellant could also have contacted his of-

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[1] Appellant's travel voucher shows that he was in a travel status from 12:30 to 2:45 p.m. *See* Agency File, Exhibit 4.

fice upon discovering that there was no training being conducted at the originally designated location and quickly ascertained the new location. Appellant's failure to undertake these prudent measures wasted time and deprived the government of his services for an estimated 1-2 hours.[2] As such, I find that he was AWOL. *Cf. Mitchell v. Department of Defense*, 22 M.S.P.R. 271, 273 (1984).

In sum, I find that the preponderance of the evidence establishes that appellant was AWOL on January 23-25. The fact that he was improperly charged AWOL for the brief period that he was traveling on the 25th, does not alter the gravamen of the charge. The charge is sustained.

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[2] Appellant's duty hours while in travel status were not established.

Charge 2

The agency charged that on February 6, 1989, appellant left the work site without permission and did not return prior to the end of his work-shift approximately 4 and 1/2 hours later. Appellant admits that he left work without permission. Nevertheless, he contends that his action was justified. Specifically, appellant testified that on the morning of the 6th, he received his time and attendance report for the prior pay period from Thurber. It showed 33.5 hours of AWOL. Believing that Thurber was unjustifiably and maliciously denying him sick leave to which he was entitled, he determined to consult his attorney. Appellant submitted a request for compensatory leave. Thurber denied the leave and an argument ensued. Thurber ultimately ordered appellant to go back to

his desk and get to work, but appellant was so upset and purportedly ill as a result of the argument, that he filled out a request for sick leave, dropped it on the secretary's desk, and left.

A letter dated April 4, 1989, from Dr. Kevin Patrick corroborates appellant's testimony that he was upset. Dr. Patrick states that he saw appellant as a patient on February 6, and that he was obviously upset and stressed. He states that he prescribed a mild anxiolytic and advised appellant to take 2-3 days away from work. In addition, Robert Anderson, Esquire, testified that appellant called him at approximately 10:30 a.m. on February 6, and that appellant seemed extremely upset. Anderson testified that he advised appellant to see a doctor.

I find that while appellant may have been upset as a result of his confronta-

tion with Thurber, his condition was not such that it justified leaving the workplace without permission. There is no evidence that he was ill or emotionally out of control, that he could not have notified someone in authority before simply leaving. He was able to contact his attorney immediately upon exiting the agency premises, and he was able to arrange, and appear for, an appointment with Dr. Patrick later in the day at a location some distance from the agency. I conclude that there was no reason why appellant could not have sought permission to leave, and if permission was denied to have remained at work until his work shift ended. Accordingly, I find that appellant's admission that he left work without permission, coupled with the lack of any credible evidence of an emergency, suffices to establish that the

conduct charged occurred. The charge is sustained. *See Henry v. Veterans Administration*, 25 M.S.P.R. 159, 161 (1984).

Charge 3

The specifications underlying Charge 3 allege that on February 6, during the argument concerning the 33.5 hours of AWOL and the denial of his request for compensatory leave, appellant was insubordinate and threatened Thurber. Specifically, the agency alleged that appellant told Thurber that he was going to do him in. . .that Thurber didn't know who he was fooling with and that when Thurber responded that appellant was being insubordinate, he walked away, stating: "I'll get you good."

In *Metz v. Department of the Treasury*, 780 F.2d 1001 (Fed. Cir. 1986), the Court of Appeals set forth those factors which the Board is to consider in deter-

mining whether an employee threatened supervisors/co-workers. *Id.* at 1002. Those factors include the listener's reaction, apprehension of harm, the speaker's intent, any conditional nature of the statements, and the attendant circumstances.

Applying the *Metz* factors to the evidence in this case, I find that a preponderance of the evidence supports the agency's charge. Thurber testified that based on his experience as a soldier and chief of police, he believed the threat to be real. He stated that he was afraid that appellant would either return to the work-place to carry out his threat or attempt an attack by "stealth" on him or his family at home. He immediately reported the matter to Dick Donaldson at the agency's Labor Relations office. He also notified George Riddick at the

agency's Washington, D.C., headquarters and certain members of his family. Thurber further testified that he took various security precautions, such as moving his desk away from the window and locking the office door. He also changed the locks on his home, changed his driving patterns and installed a security system.

James Fricks and Laura Angelo, two co-workers who were percipient witnesses to the incident, corroborated Thurber's testimony. Fricks testified that based on his observations of how angry appellant was and his knowledge of appellant's military training as a Seal, he was concerned that the office might become the subject of a mass killing, similar to those carried out by disgruntled employees at the Post Office and Pacific Southwest Airlines. He confirmed that they

immediately locked the doors and testified that, like Thurber, he changed his routine for a time. Angelo testified that she heard appellant tell Thurber he was going to get him. She also testified that she was "holding her breath" during appellant's outburst and that she was afraid for Thurber and herself.

On the other hand, appellant categorically denied that he threatened his supervisor. He testified that although he was upset, he did not become angry or raise his voice; that flying off the handle was not his way of handling things. He did, however, concede that he told Thurber that he was fooling with the wrong person; that the truth would come out.

After carefully reviewing all of the evidence presented, I find that the agency has proved the charged conduct by

preponderant evidence. In reaching this decision, I have accorded greater weight to the straight-forward, internally consistent, corroborative testimonies of Thurber, Fricks and Angelo than to appellant's contrary testimony. Further, having had an opportunity to directly observe these witnesses, I find their individual demeanor, i.e., deportment, behavior, and manner, served to enhance their overall credibility.

By contrast, I found appellant's testimony inconsistent, evasive, and contrived. I also find that the reason he offered as to why these individuals would conspire to fabricate such damaging testimony to him, i.e., that they wanted to get rid of him, because he wasn't one of the "good old boys", is at best disingenuous. There is simply no evidence that appellant was excluded from office

activities or assignments. Indeed, the record shows that he attended a barbecue with his co-workers a few days before the confrontation. Moreover, his own witnesses testified that he was confrontational and a loner.

Furthermore, even before the confrontation, Thurber had every reason to believe that he had grounds for disciplining appellant for AWOL. Whether he knew that a second instance of AWOL, standing alone, was not a removable offense under the agency's Table of Penalties is immaterial. He clearly knew that if repeated discipline did not serve to correct and conform appellant's behavior to that expected by the office, he could take steps to effect a removal action. I find that Thurber had basically no reason to fabricate the charged conduct.

In short, I find appellant's denial unworthy of belief in view of all the credible, contrary evidence. Accordingly, I find that the agency has established by preponderant evidence that appellant threatened his supervisor. The charge is sustained, as specified.

Affirmative Defense - Harassment and Reprisal

As affirmative defenses to his conduct, appellant alleges that he was subjected to a pattern of on-going harassment by Thurber, that his removal was preconceived and in retaliation for his testimony to investigators concerning per diem fraud by Thurber. Such allegations, if proven, would constitute prohibited personnel practices under 5 U.S.C. § 2302.

Based on a careful review of the nineteen incidents identified by appellant as supporting his harassment claim,

I find no evidence that the agency's actions amount to violations of the statutory prohibitions. For example, a number of the incidents identified merely relate to appellant's disagreement with matters exclusively within the agency's discretion, i.e., authorizing training, denying him a bonus, denying leave without pay, and precluding him access to personally collect his belongings after being placed on administrative leave, pending a decision on his proposed removal.

With regard to some of the other incidents, I find that appellant never offered sufficient evidence for a determination to even be made as to whether the cited incidents constituted harassment, i.e., denying appellant the right to exercise at lunch time and allegedly extorting $150.00 of appellant's per diem pay.

I also find insufficient evidence to support appellant's allegation that Thurber's actions following the "Japan" incident were a pretext for firing him. Contrary to appellant's assertions, the fact that in filing a report about appellant's conduct in Japan, Thurber initially indicated that he was going to remove appellant, and later substituted the word "suspension," *see* Appellant's Exhibit L, is simply not evidence of a preconceived plan. If anything, it indicates that while Thurber viewed appellant's conduct in Japan as warranting removal, he was willing to give him another chance. I also find insignificant the fact that the agency's decision to deny appellant's within-grade increase on the grounds that his conduct in Japan constituted unsatisfactory performance was overturned by the Board for harmful procedural error. The

plain fact is that appellant was suspended for 14 days for his conduct in Japan and, although afforded the opportunity to grieve the matter, the disciplinary action remains.

I also find that appellant has failed to meet his burden of establishing a prima facie case that his removal was reprisal for his protected activity. To establish a reprisal, the appellant bears the burden to show that he engaged in protected activity, that he was subsequently treated in an adverse fashion, and that the deciding official had actual or constructive knowledge of his protected activity. The appellant must also demonstrate that there is a causal connection between the protected activity and the adverse action, and that the protected activity was a significant factor in the taking of the adverse action. *See*

Warren v. Department of the Army, 804 F.2d 654, 657-658 (Fed. Cir. 1986).

In the instant case, appellant's activity of giving evidence in an official investigation constitutes protected activity. However, the misconduct for which appellant's removal was proposed, as well as the proposal notice, preceded the date on which appellant indicated that he engaged in this protected activity. Thus, a causal connection is lacking. *See Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 223 (1988).

Even inferring that retaliation was a factor in the agency's decision, I find that it has established by the requisite evidence that it would have imposed the same discipline even absent a prohibited motivation. *See Osokow v. Office of Personnel Management*, 25 M.S.P.R. 319, 324 (1984); *Gerlach v. Federal Trade Commis-*

sion, 9 M.S.P.R. 268, 275 (1981). As discussed below, removal is within the range of penalties provided by the agency's disciplinary guidelines for the sustained misconduct. Further, Thurber and McCullah gave no testimonial indication that they harbored ill-feelings toward appellant, and appellant's coworkers opined that Thurber had been extremely patient with appellant.

In sum, I find that appellant has failed to meet his burden of establishing by preponderant evidence that his removal was a pretext for any prohibited personnel practice.

Court of Appeals Remand Proceedings

At the Board remand hearing, McCullah testified that following his designation as deciding official, he received the Notification of Proposed Removal and supporting documentation from the agency.

He also received a response to the proposed action from appellant's attorney, Robert Anderson. After reviewing and considering the submitted material, he decided that appellant should be removed. He contacted Donaldson to advise him of his decision. He briefly discussed the reasons for his decision and directed Donaldson to draft the removal letter. He emphasized to Donaldson that the removal decision should reflect the seriousness with which he viewed the threat charge, but could not recall giving him instructions concerning the specifics of the letter. Shortly before the close of business the same day, he received a faxed draft from Donaldson and gave it to his secretary to type on official letterhead. He hastily read the typed decision and signed it.

With regard to the solicitation for murder allegation, McCullah testified that while he was vaguely aware of the allegation, there was no reference to it in the materials submitted to him and that it played no role in his deliberations. McCullah testified that his decision was based on the seriousness with which he unquestionably viewed the threat charged. He believed his decision to remove was supportable and "clean" based on the threat alone; the other two charges were simply "icing on the cake." He testified that he could not specifically recall how he learned of the allegation, but opined that the previously designated deciding official, Dennis Usrey, may have mentioned in passing that there was a report concerning the allegation when he notified McCullah that he was recusing

himself.[3] However, he testified that based on his many years of experience as an investigator, he knew that a mere allegation meant little and therefore did not consider it. McCullah also could not recall any reference being made to the allegation in his conversations with Donaldson. He testified that he saw the investigative report for the first time at the hearing in 1990, and considered it unworthy of being a charge.

McCullah also recalled that when he read the decision which Donaldson prepared, he either did not notice the inserted allegation or appreciate its significance, i.e., that the extra verbiage was a violation. He explained that in his capacity as Executive Assistant Di-

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[3] Usrey purportedly recused himself because he was involved in the investigation of a charge against appellant.

rector of the entire Naval Investigative Service, he relied on technical experts to prepare documents/decisions for his signature that were proper, and he considered Donaldson, as a technical adviser on Labor Relations matters, to be an expert on whom he could rely.

Donaldson testified that after forwarding the proposal packet to McCullah, McCullah telephoned him to advise that he had decided to remove appellant based on the charges in the Notice of Proposed Removal. Donaldson recalled that they briefly discussed the charges, but that neither of them made a reference to the allegation. He testified that McCullah told him that he considered the charges to be serious and directed that he (Donaldson) prepare a decision letter which reflected this view. Donaldson denied inserting the allegation at McCullah's

behest. He testified that he unilaterally included the allegation in the decision's discussion of the penalty because he believed it to be an appropriate aggravating factor. By way of explanation, Donaldson testified that he is frequently tasked with drafting the letters of deciding officials' decisions. Many deciding officials will discuss the contents of the letters with him in detail, but some, like McCullah, simply convey their decisions and rely on him to include appropriate details. Donaldson testified that at the time, he believed it was appropriate to include the allegation as an aggravating factor under the *Douglas* factor pertaining to rehabilitation.

The Court of Appeals made clear that: "To the extent that McCullah considered the solicitation for murder charge in arriving at his decision to re-

move Dunbar, . . . he erred . . . [and] this error cannot be considered harmless. . . ." However, based on careful consideration and weighing of the evidence of record in both proceedings, I find that the error does not amount to "harmful procedural error," requiring reversal of the agency's action.

The allegation was undoubtedly facially prejudicial to the appellant. But, the probable effect of the agency's error in injecting this allegation into the removal action must be determined in light of all the evidence in the circumstances of the case. The mere possibility of prejudice cannot suffice as a basis for inferring actual prejudice and would be inconsistent with the burden placed by statute upon the appellant to show harmful error. Thus, the question, under Board law, is whether it was within

the range of appreciable probability that the error effected the outcome before the agency. *See Parker v. Defense Logistics Agency*, 1 M.S.P.R. 505, 513-514 (1980).

In the instant case, I find that the probability that the error affected the outcome of the disciplinary action is essentially non-existent. First, I find McCullah's testimony highly credible. Had McCullah considered the allegation significant in reaching his decision, he would have undoubtedly alluded to it when he conveyed his decision to Donaldson. Yet, both he and Donaldson denied that the allegation was even mentioned. Further, even before knowing that the Court of Appeals would rule that consideration of the allegation was error, McCullah clearly testified that he did not consider it. *See* HT1 at 36, 38, 40.

In addition, there is basically no evidence that Donaldson either influenced or made McCullah's decision for him, notwithstanding appellant attorney's speculation to the contrary. McCullah consistently testified that he made his decision to remove prior to notifying Donaldson. *See* HT1 at 26 and tapes of Hearing 2 (HT2). Donaldson specifically corroborated McCullah's testimony concerning their telephone conversation. And, I find that his considerable testimony detailing his role in disciplinary actions generally lends credence to this testimony. I also find that despite the fact that Donaldson was responsible for the decision error, his testimony was straight forward, non-self-serving and his demeanor enhanced his overall credibility. Moreover, I find Donaldson's and McCullah's recollections concerning the

number and timing of their telephone conversation(s) insignificant. That McCullah recalled telephone calls concerning his designation as deciding official and extensions granted the appellant, which Donaldson did not, without more, is simply not a basis for discrediting either's testimonial denial that they ever discussed the allegation. And, Donaldson's recollection that McCullah called earlier than McCullah remembered does not establish that they discussed the allegation.

I find McCullah's testimony concerning his methods of delegating the responsibility of committing his decisions to writing and relying on technical advisors/experts to be consistent with an individual in high-level management. As such, I find it credible that he made his decision and then relied on Donaldson to reduce it to writing. I also fully

credit McCullah's testimony concerning his review of the written decision. And, a high-level manager with multiple responsibilities may not have time to read every document prepared for his signature.

Further, I find McCullah's testimony concerning the seriousness with which he viewed appellant's conduct highly persuasive and credible. At the first hearing, McCullah testified: "It was my personal belief, from having been a supervisor for close to 20 years, that the integrity of the work place depends on a set of rules, and a supervisor's authority directly challenged [in] any manner in front of other employees is a serious offense. . . ." HT1 at 10; ". . .just the one charge alone of threatening a supervisor would have been enough for me

to reach the conclusion to remove him from government service." *Id.*

During the remand hearing, McCullah was examined in more detail about his view of the threat charge vis-a-vis the allegation. He adamantly testified that his decision (to remove) would have been the same regardless of the allegation. McCullah explained that threatening a supervisor was the primary reason for his decision; that he believed the threat was sufficient to remove and that his decision was clean and did not require any "extra stuff". McCullah also testified that he found the documentation supporting the threat charge, particularly the statements provided by witnesses to the incident, compelling.

I find that McCullah's testimony in both the original and remand hearing was straightforward, internally consistent,

and highly persuasive. Further, having an opportunity to directly observe McCullah twice, I find that his demeanor, i.e., deportment, behavior, and manner, served to enhance his overall credibility.

In sum, I find that absent Donaldson's erroneous inclusion of the solicitation for murder allegation in the decision letter, the evidence plainly shows that McCullah, the deciding official would have reached the same decision regarding the penalty. Thus, even though there was error, it was not harmful. *See* 5 C.F.R. § 1201.56(b).

Remand Penalty Determination.

An agency's decision to impose a particular sanction rests on considerations of fact, facts which it must establish by preponderant evidence. But, it is also clear that the appropriateness

of a penalty, while dependent upon resolution of questions of fact, is by no means a mere factual determination. Such a decision also involves the application of administrative judgment and discretion. And, it is well established that assessment of penalties by the administrative agency is not a factual finding, but the exercise of a discretionary grant of power. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 296-297 (1981).

The Board has authority to review the penalty imposed to determine whether it is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. *Id.* at 306. However, the Board will not freely substitute its judgment for that of the agency. Only if the penalty exceeds the maximum which could be imposed, consider-

ing all the relevant factors, will the Board alter the agency's decision. *See Beard v. General Services Administration*, 801 F.2d 1318 (Fed. Cir. 1986).

A verbal threat to a supervisor is unquestionably a serious offense. Such behavior affects the agency's obligation to maintain a safe work place for its employees, thus impinging on the efficiency of the service. *See Robinson v. United States Postal Service*, 30 M.S.P.R. 678, 679 (1986), *aff'd* 809 F. 2d 792 (Table). Further, as discussed above, McCullah concluded after considering all of the evidence presented to him that the threat alone warranted removal. Even so, the Board has consistently held that AWOL and leaving the work site without permission are offenses, which warrant discipline because of their disruptive nature and adverse impact upon the efficiency of the

service. *See Desiderio v. Department of the Navy*, 4 M.S.P.R. 84, 86 (1980).

McCullah testified that in determining that removal was the appropriate discipline, he considered that appellant had less than three years of service and had been suspended for 14 days for similar misconduct.[4] Appellant contends that the Board's reversal of the agency's decision to deny his within grade increase rendered the suspension a nullity. Comparing the charges and underlying specifications of the suspension, Agency file, Tab 5 at 7, with the Board's decision on the within grade increase, I find appellant's contention without merit. The Administrative Judge reversed the denial of

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[4] Failure to follow a direct order, impersonating an NIS agent, rude, obnoxious and insulting behavior, and unauthorized absence/leaving the work site without permission. *See* Agency file, Tab J.

within grade increase for harmful procedural error, but also analyzed and made findings on the substantive charges. She found that the same incident on which charge 1 of the suspension was based was an instance of marginal performance. *See* Within Grade Decision at 6-7, Remand File, Tab 19. Charge 2 of the suspension concerns appellant's conduct during one of the same incidents on which the agency based its within grade denial. But, the decision makes no mention of that particular conduct. And, Charge 3 of the suspension is totally unrelated to the denial of appellant's within grade increase.

Further, I find that the 14-day suspension action meets the requirements set out in Bolling v. Department of the Air Force, 9 M.S.P.R. 335, 339-40 (1981). Thus, I find that it was appropriate for

the agency to rely on it in assessing the current penalty.

In addition, McCullah testified that he believed that the seriousness of the offense called for removal. But, he also reviewed the agency's Guidelines for Disciplinary Offenses and determined that removal was within the range of discipline for threats. *See* Agency file, Tab R. And, he testified that Donaldson had assured him that removal was a supportable penalty.

Moreover, Board precedent has upheld removal for threatening a supervisor. *See, e.g., Guthrie v. United States Postal Service*, 41 M.S.P.R. 102 (1989) and *Pulley v. Department of Health and Human Services*, 14 M.S.P.R. 121 (1982). The Board has also held that a sustained charge of AWOL, standing alone, is sufficient to support an agency's removal de-

cision, *see e.g., Bias v. Equal Employment Opportunity Commission*, 20 M.S.P.R. 216 (1984), and that removal was warranted for AWOL of, as little as four hours, where the employee was previously reprimanded for failure to request leave in accordance with established procedures and had a prior suspension. *See Lemons v. Department of the Air Force*, 12 M.S.P.R. 239 (1982).

Considering all of the relevant factors, I find that appellant's many years of exemplary service in the Reserves and his commendable action of apprehending a suspected criminal weigh in his favor. I have also considered the fact that the denial of appellant's within grade increase was reversed by the Board after his removal was effected and have credited his service as satisfactory even though the Board's decision found that,

in the instance discussed above, appellant's performance was marginal. Nevertheless, I find, as did McCullah, that these mitigating factors do not outweigh the seriousness of appellant's misconduct. Moreover, I conclude from appellant's unwillingness to accept responsibility for his actions that he does not fully appreciate the seriousness of his misconduct. Further, I find that appellant's patently fabricated testimony to the agency and the Board regarding the AWOL charge does not weigh in his favor. In addition, I found overall appellant's demeanor to be inapposite with the substance of his testimony. Thus, I find his potential for rehabilitation is poor.

In brief, I find that even excluding any consideration of prejudicial allegation, that the agency decision to remove does not exceed the bounds of reasonable-

ness under the circumstances of this case. I also find that it promotes the efficiency of the service.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: *Gretchen W. Thomas*
Gretchen W. Thomas
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on July 28, 1992, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a peti-

tion, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN P. DUNBAR, JR., Appellant,	)	DOCKET NUMBER SF0752890445B2
v.	)	
DEPARTMENT OF THE NAVY, Agency.	)	DATE: NOV -3 1992

John P. Dunbar, Sr., Esquire, Honolulu, Hawaii, for the appellant.

LCDR T.M. Gallagher, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of

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the remand initial decision issued on June 23, 1992, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The remand initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert Taylor /s
Clerk of the Board

Washington, D.C.

Note: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

93-3060

JOHN P. DUNBAR,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
JUL -9 1993

FRANCIS X. GINDHART
CLERK

Judgment

ON APPEAL *from the* MERIT SYSTEMS PROTECTION BOARD
in CASE NO(S). SF075289445B2

This CAUSE *having been considered, it is*

ORDERED *and* ADJUDGED:

Per Curiam (LOURIE, Circuit Judge, SKELTON, Senior Circuit Judge, and RADER, Circuit Judge.

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED JUL 09 1993 *Francis X. Gindhart*
Francis X. Gindhart, Clerk

United States Court of Appeals for the Federal Circuit

93-3060

JOHN P. DUNBAR, JR.,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

O R D E R

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9/13/93
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O R D E R

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on September 14, 1993.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: September 7, 1993

By *Diane M. Frye pt*
Diane M. Frye
Chief Deputy Clerk

cc: JOHN P. DUNBAR, SR.
JEFFREY R. DAVIS

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

SEPT 7 1993

FRANCIS X. GINDHART
CLERK

DUNBAR V NAVY, 93-3060
(MSPB - SF0752890445B-2)

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* Note: Pursuant to Fed. Cir. R. *
* 47.6, this order is not citable *
* as precedent. It is a public *
* record. *
****

RECEIVED
9/13/93
JPD

8 FEB 1989

From: Program Manager, Naval Investigative Service Command, Mobile Training Team, Pacific

To: Mr. John P. Dunbar, Training Instructor

Subj: NOTIFICATION OF PROPOSED REMOVAL

Ref: (a) Civilian Personnel Instruction 752
(b) Federal Personnel Manual, Chapter 752

1. In accordance with references (a) and (b), this is a notice proposing your removal from employment with the Naval Investigative Service Command, Mobile Training Team, Pacific, to be effective no earlier than thirty (30) calendar days from the date you receive this letter. The reasons for this proposed action are:

a. Absence without leave(AWOL)/ failure to follow absence and leave procedures. You were carried in an AWOL status on the following dates:

January 23, 1989	8 hours
January 24, 1989	8 hours
January 25, 1989	8 hours
Total	24 hours

In addition, you did not properly request leave for the three days in question or notify me as required in NSCINST P12000.2, Chapter 630. This instruction directs you to notify your immediate

supervisor of any unscheduled absence within the first hour of your work shift. You failed to provide such notification.

b. Leaving the worksite without permission (Second Offense). On February 6, 1989, at approximately 1020 hours, you left the worksite without permission and failed to return prior to the end of your workshift. You were,therefore, charged AWOL for four and one-half hours. This is a repeat of the same type of misconduct for which you were suspended on November 28, 1988.

c. Insubordination/threatening a supervisor. On February 6, 1989, at approximately 1000 hours, you approached my desk and handed me a SF-71, Application for Leave. Your request was for compensatory time beginning at 1130 hours the same day. I denied your request based on workload. At 1010 hours, you again approached me and inquired as to why I had denied your leave. I pointed out what I had documented on the leave application and reminded you of the requirement to give advance notice. You then inquired as to why I had placed you in an AWOL status during the previous pay period (January 15 to January 28, 1989). Not satisfied with my explanation, you then followed me back to my desk and stated, "I'll get you good." When I turned to face you, you stepped up to me, toe to toe, and shoved the leave application in my face touching my left cheek with it. You stated, "You can't push me around, you don't know who you're fooling with." I told you to get out of my face and go back to your desk. You stepped even closer to me and said, "I'll do you in;

"I'm going to do you in." I informed you that you were insubordinate to which you stated, "Write me up." As you walked away from my desk, you again stated, "I will get you good."

2. I have made numerous attempts to help you correct your aberrant behavior to include counselling. When attempts at counselling failed, you were suspended for fourteen (14) days on November 28, 1988, for failure to follow a direct order, representing yourself as an NIS Agent and rude, obnoxious, and insulting behavior, and leaving the worksite without permission/absence without leave (AWOL). At no time have you ever expressed any remorse for your behavior. In view of the information outlined above, the proposal to remove you from employment will clearly promote the efficiency of the Federal service.

3. You may answer this notice orally and/or in writing within ten (10) calendar days after receipt. Consideration will be given to extending this time limit if you submit a written request stating your reasons for needing more time. You may furnish affidavits and any other documentary evidence in support of your answer. Full consideration will be given to any answer you submit.

4. Your written reply, affidavits, and other documentary evidence, if any should be forwarded to:

Col. Wayne A. Coomes, USMC
Deputy Commander
Naval Investigative Service Command
Washington, D.C. 20388-5400

If you wish to reply orally, you must contact Col. Coomes before the expiration of the reply period by calling (301) 763-3390 or Autovon 293-3390, so that meeting can be arranged.

5. You may be represented by an attorney or other representative of your choice. Please designate your representative, if any, by name and address in a signed statement and forward the statement to Col. Coomes on or before the expiration of the reply period.

6. You are advised that the material on which this notice of proposed removal is based, and which is relied upon to support the reasons for the proposed action, has been assembled in a file and will be made available to you and/or your representative to review. I will arrange for you and/or your designated representative to review the file if you so desire.

7. You and your representative, if a Naval Investigative Service employee, will be allowed official time, not to exceed eight (8) hours, each to review the material relied on to support the reason for the proposed action, to prepare a written reply, to secure affidavits and other documentary evidence, and to make an oral or written reply. If you need and request additional time, the request will be approved if it is reasonable. All requests for official time should be made to me.

8. If you do not understand the reason for this proposal, you may contact me for further explanation.
Subj: NOTIFICATION OF PROPOSED REMOVAL

9. Unless otherwise notified, you will be carried in an active duty status provided you are ready, willing and able to work. You will be carried on the rolls of this activity until a decision is issued on this proposal. The proposed action, if found warranted, will not be effected before the expiration of the notice period of thirty (30) full calendar days following your receipt of this letter and until you receive a letter of final decision.

Jerry M. Thurber /s
Program Manager
NISC MTT PAC

Copy to:
Deciding Official
Code 23

DEPARTMENT OF THE NAVY
HEADQUARTERS
NAVAL INVESTIGATIVE SERVICE COMMAND
WASHINGTON, D.C. 20388

IN REPLY REFER TO
8 March 1989

From: Executive Assistant Director, Naval Investigative Service Command, Washington, D. C. 20388-5400
To: Mr. John P. Dunbar, Training Instructor

Subj: NOTIFICATION OF REMOVAL

Ref: (a) Civilian Personnel Instruction 742
(b) Federal Personnel Manual, Chapter 751

Encl: (1) Notification of Proposed Removal of 8 February 1989
(2) Merit Systems Protection Board Rules and Regulations
(3) Merit Systems Protection Board Appeals Forms
(4) Standard Form 50, Notification of Personnel Action

1. By enclosure (1), you were notified of the proposal to remove you from employment with the Naval Investigative Service Command, Mobile Training Team, Pacific, for Absence Without Leave (AWOL)/failure to follow absence and leave procedures, leaving the worksite without permission (second offense), and insubordination/threatening a supervisor.

2. You were advised of you right to reply orally and/or in writing; to furnish affidavits and any other documentary evidence in support of your answer to the proposed action; and your right to be represented by an attorney or other representative of your choice.

3. I cannot accept your written reply as a reasonable explanation for your misconduct. Upon analysis of all the facts pertinent to the proposed removal action, it is my decision that the charges contained in paragraph one (1) of enclosure (1) are sustained and warrant your removal. The charge of insubordination/ threatening a supervisor is, without question, a serious offense. Since your violent outburst and aggressive behavior, which led to the above charge, was witnessed by several co-workers, I must sustain this charge. With regard to the charge of Absence Without Leave (AWOL)/ failure to follow leave procedures, I must also sustain this charge. You failed to report for duty at NAS Alameda to conduct a training course on Shipboard Security Engagement Tactics after receipt of official travel orders and a direct order from your immediate supervisor. You were, therefore, charged with twenty-four (24) hours of AWOL. You neither requested nor were granted approved leave for the period in question. Records from Seal Team One Mustering Report, dated January 20, 21 and 22, 1989, show you were in training during the entire period. Therefore, I can only conclude your failure to meet your scheduled flight and your failure to report for duty was intentional. Finally, I also find the charge of leaving the worksite

without permission sustained. Again, you were not granted leave nor did you receive permission to leave the worksite. This is the second time in less than a year you have been charged with this offense, the first charge also being sustained.

4. In arriving at this decision, I have given full consideration to the appropriate factors set forth in Douglas V. Veterans Administration, 5 MSPB 313 (1981). First, I considered the nature and seriousness of the offense. As mentioned above, your verbal threats to your supervisor are, without question, a serious offense. Such behavior affects the Naval Investigative Service's obligation to maintain a safe work place for its employees, thus impinging upon the efficiency of the Navy. Your violent outburst and aggressive behavior in this instance, coupled with a May 17, 1988 allegation of solicitation for murder, for which you were placed on administrative leave, and your continued harassment of your co-workers, leads me to conclude that the charge of insubordination/ threatening a supervisor alone, is reason enough to sustain your removal. I have also considered your past disciplinary record. Specifically, I have considered your suspension from duty without pay for fourteen (14) days on November 28, 1988, for failure to follow a direct order, representing yourself as an NIS Agent and rude, obnoxious, and insulting behavior, and leaving the worksite without permission/Absence Without Leave (AWOL). Balancing these factors with your less than

satisfactory work record, your limited service with the Navy (less than three years), your unwillingness to accept responsibility for the charges, and the total absence of any remorse whatsoever, it is evident that further disciplinary measures, short of removal would not protect the efficiency of the Navy. Further, your record of approved leave shows that you are of marginal value to the Mobile Training team because of your unreliable attendance.

5. Based on the above, I can only conclude, at this time, you are no longer a salvageable employee and your removal is warranted. Therefore, it is my decision to remove you from employment effective the close of business March 11, 1989. Your removal is being effected in accordance with reference (a) and (b), and is considered necessary to promote the efficiency of the Navy.

6. Enclosures (2) and (3) are provided should you elect to appeal this action to the U.S. Merit System Protection Board (MSPB). You have twenty (20) calendar days after the effective date of this removal to file an appeal in writing. Your appeal must be forwarded to the Regional Director, U.S. Merit System Protection Board, San Francisco Regional Office, 525 Market Street, 28th Floor, San Francisco, CA 94105.

7. Enclosure (4) is the Standard Form 50 documenting your removal.

Lanny McCullah
LANNY MCCULLAH

Copy to:
Robert C. Anderson, esq
NSC, Code 23

THE CITY OF
SAN DIEGO

POLICE DEPARTMENT • 1401 BROADWAY
SAN DIEGO, CALIFORNIA 92101-5729 • TELEPHONE (619) 236-6100

OFFICE OF
WM. B. KOLENDER
CHIEF OF POLICE

IN REPLYING
PLEASE GIVE
OUR REF. NO.

495

October 2, 1987

Mr. John Dunbar
Naval Investigative Service
Regional Office, Code 112
Post Office Box 80667
San Diego, CA 92138-0667

Dear Mr. Dunbar:

It has come to my attention that you were instrumental in the apprehension of a robbery, armed suspect, in the 3900 block of Adams Street, San Diego.

I am told that you heard a woman yelling that she was robbed. You saw the perpetrator running from the bank parking lot. He was still wearing the mask over his face and gloves on his hands. With disregard for your personal safety, not knowing if the suspect was armed, you and another citizen tackled the suspect and held him until the police arrived.

Please accept my personal thanks for your willingness to become involved. Persons such as yourself, who are willing to step forward and become involved, help to make San Diego a truly great city.

Sincerely,

W. B. Kolender
Chief of Police

WBK/DS/jmo

-09-

BEST AVAILABLE COPY